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No. 92-124

# In the Supreme Court of the United States

OCTOBER TERM, 1992

DCP FARMS, ET AL., PETITIONERS

*v.*

SECRETARY OF AGRICULTURE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

1. Whether communications from a Member of Congress to an agency concerning a matter, before an administrative hearing on the matter is scheduled, deprived petitioners of due process.

2. Whether petitioners' claim must be dismissed for failure to exhaust administrative remedies.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of court of appeals (Pet. App. 1a-11a) is reported at 957 F.2d 1183. The opinion of the district court (Pet. App. 1c-15c) is reported at 761 F. Supp. 1269.

### JURISDICTION

The judgment of the court of appeals was entered on March 23, 1992. Petitioners filed a suggestion for rehearing en banc on April 6, 1992. Treating the suggestion for rehearing en banc as a petition for panel rehearing as well, the court of appeals denied rehearing on April 22, 1992. The petition for a writ of certiorari was filed on July 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Agricultural Act of 1949, 7 U.S.C. 1421 *et seq.* (the Act), provides for the award of agricultural subsidies, under a program administered by the Agricultural Stabilization and Conservation Service (ASCS), pursuant to authority delegated by the Secretary of Agriculture. The Act imposes limits ranging from $50,000 to $250,000 on the annual subsidy that may be paid to any "person," as defined by the Secretary. 7 U.S.C. 1308(1) (1988 & Supp. III 1991); see also 7 C.F.R. 1497.3(b).

During 1986 and 1987, it became apparent that some farmers were circumventing the Act's payment limits. Among the devices used was the so-called "Mississippi Christmas Tree," in which farmers would subdivide and reorganize their farms into multiple legal entities to qualify for more than one subsidy. See 133 Cong. Rec. 34,836-34,837, 34,842, 34,844, 34,846 (1987); 133 Cong. Rec. 3237 (1987).

In an effort to correct those abuses, Congress amended the Act in 1987. Congress enacted a provision prohibiting any "person" who receives a subsidy from holding a substantial beneficial interest in more than two other farming entities that also receive subsidies. 7 U.S.C. 1308-1(a) (1988 & Supp. III 1991). That provision became known as the "three permitted entity" rule. The Act also provided the Secretary with an administrative enforcement mechanism. Any person who the Secretary determines "has adopted a scheme or device to evade, or that has the purpose of evading" the three permitted entity rule "shall be ineligible to receive farm program payments * * * applicable to the crop year for which such scheme or device was adopted and the succeeding crop year." 7 U.S.C. 1308-2. The Secretary's regulations define "scheme or device" to include, among

other things, the creation of "fictitious entities for the purpose of concealing the interest of a person in a farming operation." 7 C.F.R. 1497.24(a) (1991).

2. The ASCS employs a three-tier system to determine eligibility for and award subsidies. 7 C.F.R. 1497.27(a) (1991). Under the regulations, farmers submit their annual farm operating plans, which serve as applications for subsidies, to the county office of the ASCS for review by a county committee. 7 C.F.R. 1497.2(e). County committees are composed of local farmers elected by their peers. 7 C.F.R. 7.4, 7.9. County committees make initial determinations of eligibility, including the number of "persons" that comprise the farm at issue, and determine the amount of the subsidies to be granted. 7 C.F.R. 1497.2(e); see also 7 C.F.R. 7.21.

A farmer dissatisfied with the determination of his county committee may seek reconsideration of the committee's decision, and thereafter may appeal to the state committee (7 C.F.R. 780.3), which consists of farmers serving at the pleasure of the Secretary. 7 C.F.R. 7.4. If a farmer remains aggrieved, he may appeal the state committee's decision to the Deputy Administrator, to whom the Secretary has delegated final decisionmaking authority. 7 C.F.R. 780.5 (1991). At each stage of the process, the farmer is entitled to an "informal hearing," at which he is given "a full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence." 7 C.F.R. 780.8(c) (1991). Finally, the regulations make clear that, although initial decisionmaking authority has been delegated to the state and county committees, ultimate authority rests with the "Administrator, ASCS, or a designee," who are not precluded "from determining any question arising under [the program] or from re-

versing or modifying any determination made by a State or county committee" or the Deputy Administrator. 7 C.F.R. 1497.2(d).

3. a. Petitioners are joint ventures controlled primarily by members of the Flowers and Parker families, operating in Tunica and Coahoma Counties, Mississippi. RA 99-102.[1] After Congress adopted the three permitted entity rule, which became effective for the 1989 crop year, petitioners reorganized their operation.[2] Petitioners created 51 irrevocable trusts, and transferred interests in their sub-divided farms to those trusts. RA 62, 99-104. Although the income beneficiaries of the trusts were third parties or employees of petitioners, the grantor of each trust ordinarily was one of the members of either the Flowers or Parker families, and the remainder beneficiary of the trust was a different family member. RA 99-101.

On April 6, 1989, the Tunica County committee approved the 1989 operating plans of DCP Farms, which was found eligible for subsidies to ten "persons," and of the Flowers and Parker Farms, which were found eligible for subsidies to five "persons." RA 33-37. On April 14, 1989, the Coahoma County committee approved the 1989 operating plan for Flowers Farms, granting subsidies to 20 "persons." RA 40-41.

b. In September, 1989, the Department of Agriculture's Office of Inspector General issued an Audit Report regarding ASCS implementation of the three permitted entity rule. The Audit Report discussed

[1] "RA" refers to the Record on Appeal. "RT" refers to the reporter's transcript of proceedings in the district court.

[2] In 1988, petitioners received subsidies as 43 "persons," consisting of six individuals and 37 corporations. Gov't C.A. Br. 8.

petitioners' operation in detail.[3] RT 83, 91. The Inspector General noted that the trusts created by petitioners appeared to be flow-through entities created to avoid the three permitted entity rule. Shortly thereafter, the Deputy Administrator began his own investigation to respond to the Audit Report, as required by internal Department of Agriculture (Department) guidelines. RT 78-79, 84.

In November 1989, several officials from the Department, including Assistant Deputy Administrator William Penn, Deputy Under Secretary for International Affairs and Commodity Programs John Campbell, and Deputy Assistant General Counsel Ralph Linden, attended a meeting with several congressional staff members to discuss the effectiveness of the three permitted entity rule and possible solutions to the problems identified in the Audit Report. RT 80-82. Petitioners' operation was discussed at the meeting as an example of the sort of problems the Audit Report had identified. RT 83. None of the participants offered any opinion regarding petitioners' eligibility for subsidies. RT 83-84.

Shortly after the November meeting, Representative Huckaby, Chairman of the House Subcommittee on Cotton, Rice, and Sugar, wrote to the Secretary of Agriculture to express his concern over the findings outlined in the Audit Report. In particular, Representative Huckaby noted the example of petitioners' farms, which he described as "a new version of the now infamous 'Mississippi Christmas Tree,' updated to attempt to circumvent the new regulations

[3] The report did not identify petitioners by name, but it is undisputed that the Tunica County operation referred to in the Audit Report was that of petitioners.

designed to limit this type of operation." RA 49. Representative Huckaby expressed the view that "[i]t was clearly not the intent of Congress that such operations would qualify for such vast sums; if this operation does receive the reported 1.4 million dollars, it will only happen because [the Department] has failed to implement and enforce the law as intended by Congress." *Ibid.* The letter urged the Secretary "to carefully review the Tunica County, Mississippi case and any other similar operations," and stated that he would introduce legislation making all trusts ineligible for payments if the Department could not correct the situation. *Ibid.*[4]

In response to Representative Huckaby, Assistant Deputy Administrator Penn drafted a letter, which was signed by Deputy Under Secretary for International Affairs and Commodity Programs Campbell on behalf of Under Secretary of Agriculture Richard Crowder. The letter stated that specific case mentioned in the Audit Report was "under review" and that the Department would "take a very aggressive position in dealing with" it. RA 52. The letter did not suggest what the outcome of the review would be, and suggested that petitioners' reorganization might be permitted under a provision in the 1987 amendments allowing for "equitable reorganization" of farming operations. *Ibid.*

[4] Representative Huckaby's letter further stated (RA 51):

> In the case of this [Tunica County] operation, the reorganization was clearly designed and carried out to evade the law applicable to payment eligibility. * * * It seems clear that this reorganization was adopted as a device to avoid the payment eligibility law, and I strongly urge you to invoke the scheme or device provision to enforce the payment eligibility law. This provision of the law was adopted for this purpose.

c. In the Spring of 1990, as part of the ongoing review of petitioners' 1989 operations, the Deputy Administrator concluded that he would make an initial determination regarding petitioners' 1990 operating plans, as authorized by regulation (see 7 C.F.R. 1497.2(d)). RT 100. The Deputy Administrator notified the state committee that petitioners' 1990 operating plans should be submitted, after county committee review, to the Deputy Administrator for final determination. RA 60. The county committees were directed not to issue a determination on these plans until the Deputy Administrator's review was completed. *Ibid.*

On June 1, 1990, the Deputy Administrator issued a decision in the form of three letters signed by Assistant Deputy Administrator Penn as Acting Deputy Administrator. The letters concluded that petitioners had adopted schemes or devices to evade the payment limitation provisions for both the 1989 and 1990 crop years. RA 67-70, 76. The decision did not rely on the reasoning of the Audit Report or Representative Huckaby's letter. Instead, the Deputy Administrator concluded that the so-called "irrevocable" trusts were not irrevocable at all, and were merely fictitious entities established to evade the three permitted entity rule.[5] The Deputy Ad-

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[5] The underlying bases for the decision were, *inter alia*, that some of the trusts had in fact been revoked; that some of the trusts ceased to exist at the time new regulations would have treated the trusts as revocable and combined them with the interests of the grantors for purposes of determining the number of persons eligible for federal subsidies; that the terms of some trusts had been violated by improper transfer of trust property; and that the purchase of some trust interests was financed with non-recourse loans with little or no risk to the buyers. See Gov't C.A. Br. 13-16.

ministrator accordingly disqualified petitioners from participating in farm subsidy programs for the 1989, 1990 and 1991 crop years.

Petitioners appealed and requested a hearing, which was set for December 12, 1990. Donald Lloyd, the Department official assigned to act as hearing officer, was not involved in the decision rendering petitioners ineligible for farm subsidies; he had, however, reviewed the letter sent in response to Representative Huckaby's inquiry. Prior to the hearing, petitioners became aware of the earlier meeting with congressional staffers and the letter from Representative Huckaby. The day before the scheduled hearing, petitioners requested that the Deputy Administrator disqualify the hearing officer assigned to their case and all employees and officials of the Department's national office. RA 17-32. That request was denied. RA 114.

4. Petitioners immediately filed the present action in district court, seeking declaratory and injunctive relief against the Secretary of Agriculture, the Department, and ASCS. The complaint alleged that petitioners' due process rights had been violated as a result of improper congressional interference, and that the Department's conduct was arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706. RA 2. Petitioners sought reinstatement of the county committee decisions approving their 1989 operating plans, and an injunction prohibiting the Secretary of Agriculture and the "national level" of the Department from participating in the determination of petitioners' eligibility for subsidies for the 1990 and 1991 crop years. RA 13-14.

The district court granted petitioners' request for a permanent injunction. Holding that agency action

can be invalidated "where the mere appearance of bias or pressure can be shown," the district court found that the letter from Representative Huckaby, along with the meeting with congressional staffers, "exerted impermissible influence upon officials at the national level of the Department of Agriculture in an effort to dictate the outcome of those proceedings." Pet. App. 8c-9c. The district court also held that petitioners' failure to exhaust their administrative remedies did not preclude judicial action, since the agency proceeding was "so impermissively tainted by Congressional interference that it render[ed] further administrative procedures futile." *Id.* at 11c-12c. The district court accordingly vacated the Deputy Administrator's decisions concluding that petitioners had adopted a scheme or device to evade the three permitted entity rule, and permanently enjoined the "national level" of the Department from participating in any determinations or administrative appeals concerning the petitioners' eligibility for federal farm program benefits for the 1989-1991 crop years. *Id.* at 16c-17c.

5. The court of appeals reversed. The court held that the "mere appearance of bias" standard used in *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966), was inapplicable in this case because the proceedings had not yet reached the stage when they could fairly be called judicial or quasi-judicial. Pet. App. 6a. Noting that the dispute between petitioners and the Department was part of a "larger policy debate," the court held that "[a]pplying *Pillsbury*'s stringent 'mere appearance of bias' standard at this juncture of [the] administrative process would erect no small barrier to Congressional oversight. * * * We are unwilling to so dramatically restrict communications

between Congress and the executive agencies over policy issues." *Id.* at 7a.

Relying on precedent from two other circuits, the court of appeals held that the proper standard for evaluating congressional interference with non-judicial agency proceedings is whether the communication actually caused the agency to consider extraneous factors. Pet. App. 7a-8a. The court noted that "an agency's patient audience to a member of Congress will not by itself constitute the injection of an extraneous factor. Nor would a simple plea for more effective enforcement of law be the injection of an improper factor." *Id.* at 8a. As applied to this case, the court concluded that it was not impermissible for "a congressman [to] express[] the view that the law ought not sanction the use of fifty-one irrevocable trusts to gain $1.4 million in subsidies." *Ibid.*

The court of appeals also held that petitioners' failure to exhaust their administrative remedies was fatal to their claim. Pet. App. 9a-10a. The court concluded that petitioners had failed as a matter of law to produce evidence to show that pursuing the administrative proceedings to a close would have been futile. The fact that the hearing officer assigned to petitioners' case had read a letter involving petitioners' situation was "weak evidence that pursuing administrative appeals would have been futile," *id.* at 10a, and petitioners had in any event failed to request that the hearing officer assigned to their case be replaced. Instead, petitioners sought the disqualification of the Department's entire national office. To the extent petitioners thought that they were harmed by the consideration of extraneous factors, the court held, they were free to make that argument

on appeal from the Deputy Administrator's final decision. *Ibid.*

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision by this Court or another court of appeals. Further review is therefore unwarranted.

1. a. A claim alleging impermissible bias on the part of an agency decisionmaker must overcome the "presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Such individuals "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." 421 U.S. at 55, quoting *United States* v. *Morgan*, 313 U.S. 409, 421 (1941).

This presumption of regularity imposes a heavy burden on a plaintiff seeking to show that a decisionmaker is biased. For example, in *FTC* v. *Cement Institute*, 333 U.S. 683 (1948), members of the Federal Trade Commission expressed the view in congressional hearings that a particular pricing system constituted an unlawful restraint of trade. See *id.* at 700. Proceeding "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations," *ibid.*, the Court nevertheless refused to find bias, and rejected a due process challenge to an agency proceeding challenging the pricing system at issue. The Court stated that "the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject." *Id.* at 701. Since the plaintiffs

were entitled to participate in the agency proceedings challenging their conduct, they "were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Ibid.*[6]

The Fifth Circuit followed *Cement Institute* in *United States* v. *Batson*, 782 F.2d 1307, cert. denied, 477 U.S. 906 (1986), a case similar to this case. In *Batson*, the court refused to vacate an ASCS determination that the plaintiffs had employed a scheme or device to evade payment limitations under the Upland Cotton Price Support Program, even though the hearing officer had publicly stated that "those people in Gaines County had bilked the government out of six million dollars." 782 F.2d at 1313-1314. The court stated that "[e]ven were we to assume that the hearing officers had decided beforehand that the facts constituted a prohibited scheme or device, no violation of due process would be present." *Id.* at 1314. The court noted that the plaintiffs had an opportunity to point out their version of the facts in an administrative hearing, and that the evidence was insufficient to show that the mind of the hearing officer was "irrevocably closed." *Id.* at 1314-1315.

The court of appeals' decision in this case merely applies these longstanding principles of due process

[6] See also *Hortonville Joint School Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) ("[m]ere familiarity with the facts of a case" does not disqualify a decisionmaker); *Withrow*, 421 U.S. at 55 ("[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing"); *Myrick* v. *City of Dallas*, 810 F.2d 1382, 1387 (5th Cir. 1987).

in the context of alleged congressional interference. As *Cement Institute* and *Batson* make clear, the fact that a decisionmaker adopts a view during the investigative stage of the proceedings does not violate due process, especially where a party has an opportunity to present facts and legal arguments in an agency hearing.[7]

In this case, the court of appeals recognized the distinction between contacts occurring during the initial investigative stage of a proceeding and pressure exerted while an adversary hearing is pending. The case on which petitioners principally rely (Pet. 9-10) for their due process argument, *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966), involved the latter situation. There the court held that a congressional investigation that "focuses directly and substantially upon the mental decisional processes of a Commission *in a case which is pending before it*," constitutes impermissible interference in the agency's judicial function. *Id.* at 964. The court noted that "[t]o subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision, * * * sacrifices the appearance of impartiality." *Ibid.*

*Pillsbury* provides no support to petitioners. In contrast to *Pillsbury*, the congressional contact in this case occurred not while a formal adversary hearing was pending, but rather during the conduct of the agency's informal investigation. Like the plaintiffs in *United States* v. *Batson*, *supra*, petitioners were

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[7] We note that petitioners cite no cases from this Court in support of the broad notion of due process that they advance; instead, they ignore altogether the presumption of regularity and this Court's decision in *Cement Institute*.

entitled at a hearing to present evidence and make legal arguments to demonstrate that their operations were not a scheme or device designed to circumvent the law. The court of appeals in this case simply harmonized its own precedents, holding that the principle of *Batson* is applicable instead of *Pillsbury* in cases where *ex parte* contacts occur before a formal adversary hearing is scheduled. The panel in this case did not purport to overrule *Pillsbury*, a case from the same circuit; moreover, even if the cases were in tension, such an intracircuit conflict would not be for this Court to resolve.

b. Petitioners argue (Pet. 12-13) that the distinction between the investigative stage and the formal adversary hearing is an artificial one. In petitioners' view, as long as the Deputy Administrator's ultimate decision regarding whether petitioners violated the payment limitations can be characterized as "adjudicative," *Pillsbury*'s "mere appearance of bias" standard must apply.[8] That contention is without merit.

Contrary to petitioners' contention, the relevant inquiry is not whether the proceeding in general can be characterized as "adjudicative," but whether the allegedly impermissible influence was exerted prior to the time when a formal hearing was pending. For example, the court in *Pillsbury* did not rely on the fact that the agency proceedings were "adjudicative" in nature, but upon the fact that the congressional pressure occurred while formal proceedings were pending in the agency. See 354 F.2d at 964. Moreover,

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[8] We note that *Pillsbury*'s stringent standard was established by the Fifth Circuit, and not this Court. Whether or not the *Pillsbury* standard is correct in the context in which it applies, it simply is not implicated on the facts of this case.

the Fifth Circuit's decision in *Batson* involved the same type of proceeding at issue here—a determination that a party had employed a "scheme or device" to evade ASCS payment limitations. See 782 F.2d at 1309-1310. Yet despite the general "adjudicative" nature of the inquiry, the court held that the decisionmaker's prior stated view in that case did not deprive the plaintiff of due process because the mind of the decisionmaker was not "irrevocably closed." See *id.* at 1314; see also *Cement Institute*, 333 U.S. at 701 (decisionmaker is not precluded from participation in a hearing merely because he was exposed to information during an *ex parte* investigation); *Morris* v. *City of Danville*, 744 F.2d 1041, 1045 (4th Cir. 1984) (decisionmaker who makes an initial decision on the basis of an *ex parte* recommendation is not precluded from participation in a subsequent adjudicative hearing).[9]

Petitioners' effort (Pet. 10-13) to show that the Deputy Administrator's decision is "adjudicative" is therefore beside the point. The cases upon which petitioners rely discuss the distinction between adjudication and rulemaking, and not the distinction between different stages of administrative proceedings. See, *e.g.*, *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 244-245 (1973); *Brown* v. *McGarr*, 774 F.2d 777, 780 (7th Cir. 1985). As we have shown, however, even if a proceeding can be characterized as

[9] Congress has also recognized the importance of the distinction between the investigative stage of an administrative action and a formal adversary hearing. The Administrative Procedure Act, for example, does not prohibit *ex parte* contacts until a matter is "noticed for hearing," unless the agency designates otherwise. 5 U.S.C. 557(d)(1)(E); see also *Marketing Assistance Program* v. *Bergland*, 562 F.2d 1305, 1309 n.6 (D.C. Cir. 1977).

adjudicative, a mere appearance of bias is insufficient to establish a due process violation unless a formal hearing is pending.

Under petitioners' theory—that pressure from Congress "[b]y definition" deprived them of due process, Pet. 14—congressional contact at any stage of a proceeding automatically, and irrevocably, disqualifies the agency from taking any further action. That is not the law. See *Peter Kiewit Sons' Co.* v. *United States Army Corps of Eng'rs*, 714 F.2d 163, 169-170 (D.C. Cir. 1983) (standard for judging whether alleged congressional interference in a proceeding to debar a government contractor violates due process is whether "extraneous factors" intruded into the decisionmaker's analysis). Courts have frequently refused to find impermissible congressional interference if the agency's response to congressional pressure is non-committal, or if the agency withstands the pressure. See *Power Auth.* v. *FERC*, 743 F.2d 93, 109-110 (2d Cir. 1984); *Gulf Oil Corp.* v. *Federal Power Comm'n*, 563 F.2d 588, 611 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *American Pub. Gas Ass'n* v. *Federal Power Comm'n*, 567 F.2d 1016, 1070 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978). These cases cannot be reconciled with petitioners' broad view of the requirements of due process in this context.

Petitioners' approach would unduly penalize an agency because a member of Congress communicated with agency officials. Petitioners do not seek relief in the form of an unbiased decision; rather, they claim that the agency is not entitled to act on their case at all, in effect giving them an exemption from the rules established by Congress for farm subsidy programs. There is no basis, however, for imposing a rule that Members of Congress must either refrain from

expressing views on particular matters or forgo enforcement of the law with respect to the situations upon which it comments. See *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981); *Gravel* v. *United States*, 408 U.S. 606, 625 (1972).

Even when subject to such congressional pressure, it remains the responsibility of the Executive Branch to determine how properly to execute the law.[10] Moreover, even if petitioners were correct that the congressional influence in this case was improper, the appropriate course would be to disqualify the individuals exposed to that improper influence. The remedy would not be, as petitioners would have it, to grant petitioners the windfall of disqualifying the the national level of the responsible agency from any part in executing the law.

2. Petitioners also claim (Pet. 14-17) that the court of appeals erred in concluding that they were required to exhaust their administrative remedies before initiating this action. That contention is without merit.

Although a court can waive the exhaustion requirement under some circumstances, it is well settled that "exhaustion is the rule in the vast

[10] Petitioners also characterize (Pet. 13-14) Representative Huckaby's contact with the agency as "subsequent legislative history" that is entitled to no weight. We fail to see how that bears on whether the agency decisionmaker was impermissibly biased. In any event, petitioners were entitled to a hearing at which they would have been free to demonstrate that Representative Huckaby's views were erroneous; moreover, after such a hearing petitioners would have been free to challenge a final adverse decision that they believed was based on an improper view of congressional intent. See Pet. App. 10a. Instead of following those avenues of relief, petitioners filed the present action.

majority of cases." *Bowen* v. *City of New York*, 476 U.S. 467, 486 (1986). To show that exhaustion is not required, petitioners must show that completing the administrative process would not serve the purposes of exhaustion—*i.e.*, that further administrative proceedings would be futile. See *id.* at 485-486; *Cassim* v. *Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Petitioners do not quarrel with the legal requirement that they demonstrate futility. Instead, they raise the fact-bound claim that the court of appeals erred in concluding that they had not shown that further administrative proceedings would be futile. Further review is unwarranted for that reason alone.

In any case, the court of appeals properly rejected petitioners' claim of futility. Petitioners' argument is based on the assertion that they should not be forced to appeal "to the same decisionmaker that issued the June 1, 1990 decisions appealed from in this action." Pet. 17. The factual assertion underlying petitioners' argument is incorrect. The June 1 decisions were made by William Penn as acting Deputy Administrator. In petitioners' administrative appeal, however, a different person, Donald Lloyd, was designated to serve as hearing officer. RT 98-99, 126. As the court of appeals recognized (Pet. App. 10a), petitioners failed to demonstrate that Lloyd was biased against them or was subjected to undue congressional pressure.

The interests favoring exhaustion in this case are compelling. A hearing would give petitioners an opportunity to present factual and legal arguments to show that their trust arrangements did not violate the statute. If such arguments had merit, the agency would thereby have an opportunity to correct the error in the initial decisions. See *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1086 (1992). In addition, an

administrative hearing would produce a more complete record for subsequent judicial review, an important factor in this factually complex case. See *id.* at 1087. Finally, in view of the fact that exhaustion concerns "apply with particular force" when the proceedings require agency expertise, *id.* at 1086, exhaustion of administrative remedies was particularly important here in order to give the agency an opportunity to apply its expertise in administering the farm subsidy programs.[11]

[11] In a footnote (Pet. 15 n.4), petitioners raise the contention that 5 U.S.C. 704 makes exhaustion the exception rather than the rule, stating that administrative appeals are not a prerequisite to judicial review *unless* a statute or regulation requires otherwise. Petitioners failed to raise that argument either in the district court or in the court of appeals, and therefore are precluded from raising it for the first time in this Court.

In any event, petitioners' argument is incorrect. Where Congress does not require exhaustion explicitly, "sound judicial discretion governs" the issue, and the court must balance the interest in prompt access to the courts against the purposes of exhaustion. *McCarthy* v. *Madigan*, 112 S. Ct. at 1086-1087. Section 704 does nothing to alter this framework. That Section governs the jurisdictional issue of finality and not the issue of whether exhaustion should be required as a matter of sound judicial discretion. See *Missouri* v. *Bowen*, 813 F.2d 864, 870-871 (8th Cir. 1987); *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 n.3 (9th Cir. 1978). The same issue is before the Court in *Darby* v. *Kemp*, petition for cert. pending, No. 91-2045, in which we filed our brief in opposition on August 19, 1992.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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